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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 777

GROVER D. TURNBOW AND RUTH H. TURNBOW,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

This case presents the question of whether a gain realized by the taxpayer upon the transfer of his stock in a wholly-owned corporation in consideration for voting stock in another corporation, plus cash, is recognizable in its entirety, as the court of appeals held, or only to the extent of the cash received. The answer depends upon whether a transfer of stock must be in exchange "solely" for voting stock of another corporation in order to qualify as a "reorganization" under Section 112(g)(1)(B) and (b)(3) of the 1939 Code, as those sections expressly require, or whether, as the taxpayer contends, Section 112(c) is to be construed as eliminating that statutory requirement.

In his deficiency notice, the Commissioner determined that the instant exchange failed to qualify as a "reorganization" within the meaning of Section 112(g)(1)(B) and (b)(3) of the 1939 Code in that these provisions of the Code define a "reorganization" as an exchange of stock of an acquired corporation "solely" for voting stock of the acquiring corporation, while here the taxpayer transferred his shares in a wholly-owned corporation for voting stock of the acquiring corporation, plus cash. Hence, the Commissioner determined that Section 112(c)(1), a provision limiting recognition of gain to the extent of the "boot" (cash and other property), was not operative since this subsection comes into play only if an exchange otherwise qualifies as a "reorganization" as defined by Section 112(g)(1)(B). The Tax Court rejected the Commissioner's determination, holding that the gain realized by the taxpayer was recognizable only to the extent of the cash received, $3,000,000, and that the $1,163,691 gain from the stock which taxpayer received was not to be recognized. The Court of Appeals for the Ninth Circuit reversed the Tax Court, holding that an exchange must independently meet the "solely for voting stock" requirement of Section 112(g)(1)(B) (*i.e.*, without resorting to Section 112(c)(1) as grounds for disregarding "boot") as a prerequisite to the application of the latter section. Since the instant exchange failed to qualify, the court of appeals held that the gain realized by the taxpayer was recognizable in its entirety.

We submit that the decision of the Ninth Circuit is correct for the reasons spelled out in its opinion. It is based upon a careful consideration of the legislative history of the relevant Code sections, the full import of the applicable Treasury Regulations involved,[1] and other decisions.[2] We agree, however, that *Howard* v. *Commissioner*, 238 F. 2d 943 (C.A. 7), upon which petitioner relies, conflicts with the instant decision insofar as it holds that Section 112(c)(1) is applicable to an exchange irrespective of whether the transaction independently qualifies as a "reorganization" under Section 112(g)(1)(B) and (b)(3). But it should be pointed out that the facts in *Howard* and those in the instant case differ considerably,[3] and that these are the only two cases involving the precise

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[1] Treasury Regulations 118, Section 39.112(c)-1, 39.112(g)-1, 39.112(g)-2, and 39.112(g)-4.

[2] An examination of the cases cited by the taxpayer (Pet. 10) as allegedly conflicting with the decision below shows that in each, with the exception of *Howard* v. *Commissioner*, 238 F. 2d 943 (C.A. 7), it was either expressly stated or clearly assumed that the exchange qualified as a reorganization or was made pursuant to a plan of reorganization under the statute then in effect. The decision below is in accord with *Helvering* v. *Southwest Consolidated Corp.*, 315 U.S. 194; *Commissioner* v. *Air Reduction Co.*, 130 F. 2d 145 (C.A. 2), certiorari denied, 317 U.S. 681; *Central Kansas T. Co.* v. *Commissioner*, 141 F. 2d 213 (C.A. 10); *Pressed Steel Car Co.* v. *Commissioner*, 152 F. 2d 280 (C.A. 3), affirming 1944 P-H T.C. Memorandum Decisions, ¶ 44,279; *Forrest Hotel Corp.* v. *Fly*, 112 F. Supp. 782 (S.D. Miss.).

[3] In *Howard*, the taxpayers received no cash or other property. The cash paid by the acquiring corporation was paid solely to dissenting stockholders not involved in that litigation.

question as to which there is conflict. Nevertheless, because there is a direct conflict in circuits and the problem is a continuing one,[4] the Commissioner does not oppose the taxpayer's petition for certiorari.

Respectfully submitted.

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MAY 1961.

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[4] Section 112(c)(1), insofar as is pertinent here, has been carried over into the 1954 Code in Section 356(a). The Revised Report published by the Advisory Group on Subchapter C of the Internal Revenue Code of 1954 to accompany H. Rep. No. 4459, 86th Cong., 1st Sess., recommended that Section 356(a) be amended to state explicitly that it "operates only in a transaction which, independent of its provisions, qualifies as a reorganization."

U.S. GOVERNMENT PRINTING OFFICE: 1961